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OPEN MEETING ITEM 3/17/04



ORIGINAL

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ARIZONA CORPORATION COMMISSION

MEMORANDUM

TO: Marc Spitzer, Chairman
William A. Mundell
Jeff Hatch-Miller
Mike Gleason
Kristin K. Mayes

FROM: Matthew J. Neubert
Director of Securities

DATE: March 2, 2004

RE: *In the Matter of Evelyn Baumgardner d/b/a Your Living Trust, et vir.*, Docket No. S-03509A-02-0000

CC: Brian C. McNeil, Executive Secretary

Arizona Corporation Commission

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Attached is a proposed Order to Cease and Desist, for Restitution, and for Administrative Penalties and Consent to Same by Respondents Evelyn Baumgardner, d/b/a Your Living Trust, and Michael Baumgardner, her husband ("Consent Order"). This order was negotiated to resolve claims regarding sales of pay telephone investment contracts involving phones offered by Alpha Telcom and related entities, generally through sales by licensed insurance professionals.

Salespersons for these pay phone contracts, including Baumgardner, were recruited by various means. They were provided with legal opinions stating that the investment contracts in question were not securities (these opinions, however, did not address Arizona law regarding investment contracts). Moreover, during the period when most of the insurance salespersons were selling these contracts, a number of jurisdictions had already begun to take action against Alpha Telcom for illegal securities sales. As a result, had the salespersons checked further regarding the legality of the sales, they could have determined that there were questions regarding whether the investments should have been registered as securities. In this case, once Ms. Baumgardner learned the facts regarding the investments (following the company's bankruptcy filing), she made significant efforts to recover funds on behalf of the investors to whom she had sold, even though those efforts were unsuccessful.

The proposed Consent Order calls for Respondent Evelyn Baumgardner to cease and desist from further violations of the Arizona Securities Act, and orders Respondents to disgorge all commissions she received from sales of Alpha Telecom pay telephones and pay an administrative penalty of \$5,000. The Securities Division recommends approval of this Consent Order. The Order reflects full disgorgement of all commissions, and the penalty reflects an appropriate penalty for the activity, particularly in consideration of the fact that the Respondent did attempt measures to rectify her wrongful conduct.

Originated by: Kathleen Coughenour DeLaRosa

MJN/kcd

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

EVELYN BAUMGARDNER d/b/a YOUR
LIVING TRUST

7141 North 51st Avenue, Suite A
Glendale, Arizona 85301

MICHAEL BAUMGARDNER
7141 North 51st Avenue, Suite A
Glendale, Arizona 85301,

Respondents.

DOCKET NO. S-03509A-02-0000

**ORDER TO CEASE AND DESIST, FOR
RESTITUTION, AND FOR
ADMINISTRATIVE PENALTIES AND
CONSENT TO SAME BY RESPONDENTS
EVELYN BAUMGARDNER, d/b/a YOUR
LIVING TRUST, AND MICHAEL
BAUMGARDNER, HER HUSBAND**

RESPONDENTS EVELYN BAUMGARDNER, d/b/a YOUR LIVING TRUST
("BAUMGARDNER") and MICHAEL BAUMGARDNER, her husband ("RESPONDENT
SPOUSE") (collectively "RESPONDENTS") elect to permanently waive any right to a hearing and
appeal under Articles 11 and 12 of the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities
Act") with respect to this Order To Cease and Desist, for Restitution, and for Administrative Penalties
and Consent to Same by Respondents Evelyn Baumgardner d/b/a Your Living Trust, and Michael
Baumgardner, her husband ("Order"). RESPONDENTS admit the jurisdiction of the Arizona
Corporation Commission ("Commission"); neither admit nor deny the Findings of Fact and
Conclusions of Law contained in this Order; and consent to the entry of this Order by the Commission.

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Docket No. S-03509A-02-0000

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FINDINGS OF FACT

1. BAUMGARDNER is an individual whose current business address is 7141 North 51st Avenue, Suite A, Glendale, Arizona 85301.

2. At all times material hereto, BAUMGARDNER was married to MICHAEL BAUMGARDNER. All acts done by BAUMGARDNER were done in furtherance of and for the benefit of the marital community of BAUMGARDNER and MICHAEL BAUMGARDNER. MICHAEL BAUMGARDNER was joined in this action, pursuant to A.R.S. §44-2031(C), solely to determine the liability of the marital community for the violations alleged in the Notice.

3. At all times material hereto, Alpha Telcom, Inc. ("Alpha") was an Oregon corporation located at 2751 Highland Avenue, Grants Pass, Oregon 97526.

4. At all times material hereto, American Telecommunications Company, Inc. ("ATC") was a Nevada corporation formed as a wholly owned subsidiary of Alpha on or about September 17, 1998. Originally named ATC, Inc., the name was changed to American Telecommunications Company, Inc., sometime in the first half of 2000. Its address was the same as Alpha's, but was later changed to 620 S.W. 4th Street, Grants Pass, Oregon 97526, then to 2900 Vine Street, Suite J, Grants Pass, Oregon 97526, and then to 942 S.W. 6th Street, Suite G, Grants Pass, Oregon 97526.

5. At all times material hereto, Paul S. Rubera ("Rubera") was the president and control person of Alpha, and the control person of ATC.

6. ATC was organized by Rubera and operated in conjunction with and as an alter ego of Alpha. The two companies were controlled by Rubera and his associates.

7. At all times material hereto, Alpha and ATC, and their affiliates, sold pay telephones with telephone service agreements pursuant to which the investor would share in the profits of the pay telephone. Investors would enter into two agreements, a purchase agreement, and a service agreement with Alpha to manage the phone. The two agreements were presented and promoted simultaneously. The telephones were presented to potential investors with four options in the way of service contracts.

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1 each varying in the amount of service provided. The four options varied from Level 1, which included
2 a minimum of service, to Level 4, which provided full service to the purchaser, including choosing a
3 site and installing the telephone, collecting all revenue from the telephone's operation, repairing the
4 telephone when necessary, and even repurchasing or buying back the telephone at the investor's
5 option. Under Level 4, Alpha would split the net proceeds with the investor on a 70/30 basis, with
6 Alpha retaining 70% and the investor receiving 30%. The price of the pay telephones was the same
7 regardless of the service option chosen, \$5,000.00 per telephone. Although investors were given a
8 choice of using a company other than Alpha to manage the phone, the overwhelming majority, if not
9 all, of the Arizona investors picked Alpha to manage their phones. A "typical return" on each pay
10 telephone was touted as 14% per year. In practice, most purchasers received \$58.34 monthly per pay
11 telephone purchased. The sum of \$58.34 per month is exactly 14% per annum.

12 8. ATC's primary role was marketing the contracts. Alpha's main focus was on obtaining
13 phone sites and installing, servicing, and managing the phones.

14 9. ATC was presented to the public as the sales organization for Alpha. In early 1999,
15 ATC engaged Strategic Partnership Alliance, L.L.C., a Nevada limited liability company, and/or SPA
16 Marketing, L.L.C., a Nevada limited liability corporation, (collectively "SPA") as its independent
17 marketing and sales firm(s). SPA thereafter was responsible for hiring, training, and supervising sales
18 agents who were selling the telephone contracts. After SPA came on board, ATC remained as the
19 processing center for the contracts, while Alpha continued to perform the service and maintenance of
20 the phones.

21 10. BAUMGARDNER, directly or indirectly, entered into agreements with Alpha and/or
22 ATC pursuant to which BAUMGARDNER sold investment contracts involving Alpha pay telephones
23 (the "Alpha investment contracts") within or from the state of Arizona. All of BAUMGARDNER'S
24 customers purchased a Level 4 service contract with their telephones.

25 11. BAUMGARDNER received a commission for each telephone sold.

26 12. BAUMGARDNER sold Alpha investment contracts involving at least 123 telephones to

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1 at least 14 individuals or entities within or from the state of Arizona from August 1, 2000 through May 31,
2 2001, for a total sales amount of at least \$705,000.

3 13. BAUMGARDNER received commissions on those sales in the amount of \$70,500.

4 14. Alpha has a long regulatory history in which state securities regulators have found that
5 these purchases of pay telephones and accompanying service contracts were unregistered securities in the
6 form of investment contracts that were sold by unregistered persons and/or entities, and ordered Alpha and
7 those working with it to cease and desist. The actions taken by states relevant to the period of time that
8 BAUMGARDNER sold Alpha investment contracts include:

- 9 a. February 2, 1999, Cease and Desist Order issued by Pennsylvania Securities
10 Commission, *In the Matter of Alpha Telcom, Inc., et al.*, No. 9812-06.
- 11 b. November 17, 1999, Cease and Desist Order issued by North Carolina Secretary
12 of State, *In the Matter of the North Carolina Securities Division v. ATC, Inc., Paul Rubera, et al.*, No. 99-038-CC.
- 13 c. June 30, 1999, Temporary Order of Prohibition issued by Illinois Secretary of
14 State, *In the Matter of Alpha Telcom, Inc.*, No. 9900201.
- 15 d. January 14, 2000, Consent Order of Prohibition issued by Illinois Secretary of
16 State, *In the Matter of Alpha Telcom, Inc.*, No. 9900201, in which Alpha agreed
17 to offer rescission to all Illinois purchasers.
- 18 e. November 24, 1999, Cease and Desist Order issued by Wisconsin Department
19 of Financial Institutions, *In the Matter of Alpha Telcom, Inc. and Paul S. Rubera, et al.*, No. S-99225(EX).
- 20 f. March 7, 2000, Temporary Cease and Desist Ordered issued by Rhode Island
21 Department of Business Regulation, *In the Matter of Alpha Telcom, Inc. and ATC, Inc.*
- 22 g. July 18, 2000, Florida Department of Banking and Finance filed administrative
23 action against Alpha and others, seeking a Cease and Desist Order.
- 24 h. October 24, 2000, Desist and Refrain Order issued by California Department of
25 Corporations.

26 15. Actions against Alpha entered after BAUMGARDNER ceased selling Alpha
investment contracts include:

- a. July 26, 2001, Cease and Desist Order issued by Ohio Commissioner of Securities;

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- b. August 27, 2001, Temporary Restraining Order issued by United States District Court, District of Oregon, *SEC v. Alpha Telecom, Inc., et al.*, No. CV01-1283 PA
- c. September 5, 2001, Cease and Desist Order issued by Arkansas Securities Department, *In the Matter of Alpha Telecom, Inc., et al.*, No. 01-36-S.
- d. September 6, 2001, Preliminary Injunction issued by United States District Court, District of Oregon, *SEC v. Alpha Telecom, Inc., et al.*, No. CV01-1283 PA.
- e. February 7, 2002, Final Judgment of Permanent Injunction issued by United States District Court, District of Oregon, *SEC v. Alpha Telecom, Inc., et al.*, No. CV01-1283 PA.
- f. March 13, 2002, Final Order to Cease and Desist issued by Washington Department of Financial Institutions in *In the Matter of Alpha Telecom, Inc., et al.*, No. SDO-21-02.

The SEC's Complaint in the United States District Court, District of Oregon, alleged that Alpha and its affiliates engaged in a Ponzi-like scheme that never generated enough income to pay expenses, and that the money paid to existing investors always came from sales to new investors. Several days before the Temporary Restraining Order was issued on August 27, 2001, Alpha sought bankruptcy protection in Florida pursuant to chapter 11 of the Bankruptcy Code. A court-appointed receiver subsequently took over the remaining operations of Alpha. Alpha consented on October 19, 2001 to entry of the Final Judgment of Permanent Injunction against it, but did not admit the allegations of the Complaint. On February 7, 2002, the United States District Court for the District of Oregon filed its final opinion in connection with the trial of Rubera. In that opinion, the court held that the Alpha investment contracts are securities subject to regulation, and that Alpha operated a Ponzi-type scheme in connection with sales of the Alpha investment contracts.

16. Alpha's monthly payments to investors ceased prior to August, 2001.

II.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act.
2. BAUMGARDNER offered or sold securities within or from Arizona, within the

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1 meaning of A.R.S. §§ 44-1801(15), 44-1801(21), and 44-1801(26).

2 3. BAUMGARDNER violated A.R.S. § 44-1841 by offering or selling securities that were
3 neither registered nor exempt from registration.

4 4. BAUMGARDNER violated A.R.S. § 44-1842 by offering or selling securities while
5 neither registered as a dealer or salesman nor exempt from registration.

6 III.

7 ORDER

8 THEREFORE, on the basis of the Findings of Fact and Conclusions of Law, the Commission
9 finds that the following relief is appropriate, in the public interest, and necessary for the protection of
10 investors:

11 IT IS ORDERED, pursuant to A.R.S. § 44-2032, that BAUMGARDNER, her agents,
12 employees, successors and assigns, permanently cease and desist from violating the Securities Act.

13 IT IS FURTHER ORDERED, pursuant to A.R.S. § 44-2032, that RESPONDENTS, including
14 the marital community of BAUMGARDNER and MICHAEL BAUMGARDNER, shall pay restitution
15 to Arizona investors shown on the records of the Commission in the amount of \$70,500. Any amount
16 outstanding shall accrue interest at the rate of 10% per annum from the date of this Order until paid in
17 full. The restitution amount payable by RESPONDENTS shall be reduced by all principal, interest, or
18 other distributions received by the investors from any source, including but not limited to, any monies
19 recovered by investors pursuant to legal actions, or claims made by or on behalf of the investors
20 against the insurers, receivers, or principals of Alpha, ATC, SPA or any affiliate or associated entity,
21 or pursuant to any action brought by any state or federal regulatory agency or department or by the
22 receiver or bankruptcy estate of Alpha, ATC, SPA or any affiliate or associated entity, to the extent
23 any investor would recover more than the investor's original investment amount without such
24 reduction. The initial payment of \$300 is due on the date of this Order. Monthly payments in the
25 amount of \$150 shall be made by cashier's check or money order payable to the "State of Arizona" to
26 be placed in an interest-bearing account maintained and controlled by the Arizona Attorney General.

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1 Monthly payments shall be due and payable on the thirtieth day of each month beginning the first
 2 month following entry of this Order. The Arizona Attorney General shall disburse the funds on a pro
 3 rata basis to investors. If all investors are paid in full, any excess funds shall revert to the state of
 4 Arizona.

5 IT IS FURTHER ORDERED, pursuant to A.R.S. § 44-2036, that RESPONDENTS, including
 6 the marital community of BAUMGARDNER and MICHAEL BAUMGARDNER, shall pay an
 7 administrative penalty in the amount of \$5,000.00, payable to the "State of Arizona." Any amount
 8 outstanding shall accrue interest at the rate of 10% per annum from the date of this Order until paid in
 9 full. This administrative penalty is subordinate to the restitution obligation in the preceding paragraph
 10 and shall be paid following payment in full of the restitution obligation and in accordance with the
 11 payment schedule set forth in the preceding paragraph.

12 IT IS FURTHER ORDERED that this Order shall become effective immediately.

13 BY ORDER OF THE ARIZONA CORPORATION COMMISSION

14
 15 CHAIRMAN COMMISSIONER COMMISSIONER

16
 17 COMMISSIONER COMMISSIONER

18
 19 IN WITNESS WHEREOF, I, BRIAN C. McNEIL,
 20 Executive Secretary of the Arizona Corporation
 21 Commission, have hereunto set my hand and caused
 the official seal of the Commission to be affixed at the
 Capitol, in the City of Phoenix, this ____ day of
 _____, 2004.

22
 23 BRIAN C. McNEIL
 Executive Secretary

24 DISSENT

25 This document is available in alternative formats by contacting Yvonne McFarlin, Executive Assistant
 26 to the Executive Secretary, voice phone number (602) 542-3931, e-mail ymcfarlin@cc.state.az.us
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CONSENT TO ENTRY OF ORDER

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2 1. EVELYN BAUMGARDNER, d/b/a YOUR LIVING TRUST, a married woman
3 ("BAUMGARDNER"), and MICHAEL BAUMGARDNER, her husband, admit the jurisdiction of the
4 Commission over the subject matter of this proceeding. RESPONDENTS acknowledge that they have
5 been fully advised of their rights to a hearing to present evidence and call witnesses and
6 RESPONDENTS knowingly and voluntarily waive any and all rights to a hearing before the
7 Commission and all other rights otherwise available under Article 11 of the Securities Act and Title 14
8 of the Arizona Administrative Code. RESPONDENTS acknowledge that this Order To Cease And
9 Desist, for Restitution, and for Administrative Penalties and Consent to Same by Respondents Evelyn
10 Baumgardner d/b/a Your Living Trust, and Michael Baumgardner, her husband ("Order") constitutes a
11 valid final order of the Commission.

12 2. RESPONDENTS knowingly and voluntarily waive any right under Article 12 of the
13 Securities Act to judicial review by any court by way of suit, appeal, or extraordinary relief resulting
14 from the entry of this Order.

15 3. RESPONDENTS acknowledge and agree that this Order is entered into freely and
16 voluntarily and that no promise was made or coercion used to induce such entry.

17 4. RESPONDENTS acknowledge that they have been represented by counsel in this
18 matter, they have reviewed this Order with their attorney and understand all terms it contains.

19 5. RESPONDENTS neither admit nor deny the Findings of Fact and Conclusions of Law
20 contained in this Order.

21 6. By consenting to the entry of this Order, RESPONDENTS agree not to take any action
22 or to make, or permit to be made, any public statement denying, directly or indirectly, any Finding of
23 Fact or Conclusion of Law in this Order or creating the impression that this Order is without factual
24 basis. BAUMGARDNER will undertake steps necessary to assure that all of her agents and
25 employees, if any, understand and comply with this agreement.

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1 7. While this Order settles this administrative matter between RESPONDENTS and the
2 Commission, RESPONDENTS understand that this Order does not preclude the Commission from
3 instituting other administrative proceedings based on violations that are not addressed by this Order.

4 8. RESPONDENTS understand that this Order does not preclude the Commission from
5 referring this matter to any governmental agency for administrative, civil, or criminal proceedings that
6 may be related to the matters addressed by this Order.

7 9. RESPONDENTS understand that this Order does not preclude any other agency or
8 officer of the state of Arizona or its subdivisions from instituting administrative, civil or criminal
9 proceedings that may be related to matters addressed by this Order.

10 10. BAUMGARDNER agrees that she will not apply to the state of Arizona for registration
11 as a securities dealer or salesman or for licensure as an investment adviser or investment adviser
12 representative until such time as all restitution and penalties under this Order are paid in full.

13 11. RESPONDENTS agree that until restitution and penalties are paid in full,
14 RESPONDENTS will notify the Director of the Securities Division within 30 days of any change in
15 home address or any change in RESPONDENTS' ability to pay amounts due under this Order.

16 12. RESPONDENTS understand that default shall render them liable to the Commission
17 for its costs of collection and interest at the maximum legal rate.

18 13. BAUMGARDNER agrees that she will continue to cooperate with the Securities
19 Division including, but not limited to, providing complete and accurate testimony at any hearing in
20 this matter and cooperating with the state of Arizona in any related investigation or any other matters
21 arising from the activities described in this Order.

22 14. BAUMGARDNER and MICHAEL BAUMGARDNER acknowledge that any
23 restitution, rescission or penalties imposed by this Order are obligations of BAUMGARDNER as well
24 as the marital community.

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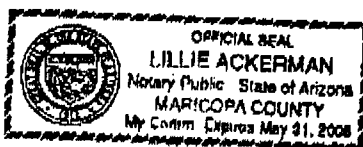
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1 15. RESPONDENTS consent to the entry of this Order and agree to be fully bound by its
2 terms and conditions. If RESPONDENTS breach any provision of this Order, the Commission may
3 vacate this Order and restore this case to its active docket.

4
5 
6 EVELYN BAUMGARDNER

7 
8 MICHAEL BAUMGARDNER

9 SUBSCRIBED AND SWORN TO BEFORE me this 1 day of March
10 2004.



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13 NOTARY-PUBLIC

14 My Commission Expires:

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